

Internal Revenue Service  
**memorandum**

CC:TL-N-694-92

FS:CORP:GBFleming

date: DEC 6 1991

to: District Counsel, Anchorage W:ANC

from: Assistant Chief Counsel (Field Service) CC:FS

subject: [REDACTED]

This responds to your memorandum dated October 10, 1991, requesting advice regarding the above-referenced bankruptcy case. Because of the pending bankruptcy litigation involving this taxpayer, you asked that we send our response directly to the Department of Justice. In accordance with that request, we provided oral advice to Thomas J. Sawyer, the Department of Justice trial attorney, on October 25, 1991. Because of restrictions on the dissemination of written formal advice (see the legend on the last page of this memorandum), however, we are furnishing this memorandum only to your office.

**ISSUE**

Whether the taxpayer, an Alaska Native Corporation (ANC), may use its net operating losses arising from the calendar year ended [REDACTED], to offset income assigned by the purchasers of its net operating losses and credits in the fiscal year ended [REDACTED], and, if so, whether it may carry back losses incurred after [REDACTED] so long as its post [REDACTED] losses do not exceed \$[REDACTED].

**CONCLUSION**

The taxpayer is not allowed to carry back its NOLs from [REDACTED] to offset income assigned to it in the fiscal year ended [REDACTED]. Moreover, the Technical and Miscellaneous Revenue Act of 1988 does not allow for the use of losses incurred after 1992.

**FACTS**

Pursuant to the special rules allowing Alaska Native Corporations to sell their net operating losses (NOLs) and credits to other corporations, [REDACTED] entered into such agreements in [REDACTED] with [REDACTED] and [REDACTED]. On its return for fiscal year ending [REDACTED] (the "[REDACTED] return"), [REDACTED] reported an assignment

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in the amount of \$ [REDACTED] from its affiliate, [REDACTED] ([REDACTED]) and \$ [REDACTED] from [REDACTED] ([REDACTED]). Without the assignments from these two affiliates and before applying a claimed NOL carryforward of \$ [REDACTED], [REDACTED] reported a taxable loss of \$ [REDACTED] on its [REDACTED] return.

As a result of an audit, the Internal Revenue Service is proposing to disallow some of [REDACTED]'s losses and thus spring back \$ [REDACTED] of the income assigned by [REDACTED].<sup>1/</sup> In order to preserve its NOL and investment tax credit sales proceeds, [REDACTED] is arguing that it is entitled to carry back its NOL of approximately \$ [REDACTED] from [REDACTED] to [REDACTED] to absorb a portion of the excess assignments of income.<sup>2/</sup>

### DISCUSSION

For the purpose of responding to your request, we coordinated with the Assistant Chief Counsel (Corporate), and we understand that a copy of the memorandum dated November 1, 1991 (the "Corporate memorandum"), that we received from Edward S. Cohen, Chief, CC:CORP:2, was previously sent to you by that office. The Corporate memorandum recognizes that a literal reading of section 5021 of the Technical and Miscellaneous Revenue Act of 1988 (the "1988 Act") appears to allow an ANC to sell its NOLs up to a total of \$40 million, whenever incurred, provided it entered into a binding contract before the cut-off date. We concur with the conclusion in the Corporate memorandum, however, that the 1988 Act should be read more narrowly based on the following supporting arguments, which are set forth more fully in that memorandum:

First, prior to the 1988 Act, the Service took the position in numerous private letter rulings that Congress intended to allow ANCs to sell their current year and carryover losses but any income in excess of those losses would "spring back" to the assignor. This position was based on the legislative history of the Tax Reform Act of 1984, which indicates that Congress intended assignments against NOLs incurred in the current year or carried over from previous years -- but not against NOLs that the ANC may incur in the future.

Second, allowing an ANC to carry back NOLs to absorb overassignments would produce unintended results, such as rate arbitrage resulting from the assignment of a profitable corporation's income (subject to the 46 percent rate) to an ANC (subject in whole or in part to a 34 percent rate). In addition, the Service's "spring-back" position would be subverted. As noted in your memorandum, that position requires an *annual* determination of the ANC's losses and credits along

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<sup>1/</sup> The Service is not proposing to spring back any of the income assigned by [REDACTED]

<sup>2/</sup> In [REDACTED], [REDACTED] changed its taxable year from a fiscal year to the calendar year.

with the corresponding amount of assigned income. If an ANC could carry back NOLs to offset overassignments, the taxable years of the ANC and the assignors would all have to be held open until the available amount of NOL carrybacks could be determined.

Third, section 5021(c) of the 1988 Act provided that an ANC should receive notice and an opportunity to participate (by way of a written statement) with respect to any proposed adjustments of an assignor's tax liability attributable to an asserted overstatement of the ANC's losses. Such a procedure would not have been necessary if the ANC could report overassignments on its own return because such overassignments would generate a deficiency by the ANC, which could directly challenge any overstatement of losses. Thus, Congress implicitly concurred with the Service's ruling position and did not expect that an ANC would have an overassignment.

Fourth, the 1988 Act was intended to terminate the availability of the special consolidated return rules for ANCs. It would be inconsistent with that purpose to read the 1988 Act as allowing ANCs the additional benefit of using NOLs incurred after the original 1992 deadline.

As a final matter, the Corporate memorandum notes that some taxpayers received private letter rulings that allowed for an overassignment of income to an ANC to avoid any alternative minimum tax liability by the ANC. There is no record that such a ruling was given to [REDACTED], which is not entitled to rely on rulings given to other taxpayers. In any event, all such rulings have recently been revoked.

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Please contact Jerry Fleming at FTS 566-3335 if there are any questions.

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(Field Service)

By:

  
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